DISTRICT COURT, BOULDER COUNTY, COLORADO Boulder Justice Center 1777 Sixth St. Boulder, CO 80302 Phone: (303) 441-3750 **PLAINTIFFS:** COLORADO OIL & GAS ASSOCIATION; and COLORADO OIL & GAS CONSERVATION COMMISSION; **PLAINTIFF-INTERVENOR**: TOP OPERATING, CO. v. **DEFENDANT:** CITY OF LONGMONT, COLORADO; **DEFENDANT-INTERVENORS**: OUR HEALTH, OUR FUTURE, OUR LONGMONT; SIERRA CLUB; FOOD & WATER WATCH; and EARTHWORKS. Karen L. Spaulding, #16547 BEATTY & WOZNIAK, P.C. 216 Sixteenth Street, Suite 1100 Denver, CO 80202-5115 Phone Number: 303-407-4499 Fax Number: 303-407-4494 kspaulding@bwenergylaw.com Attorneys for Plaintiff Colorado Oil & Gas Association	DATE FILED: March 28, 2014 2:23 PM FILING ID: 7CF8392B2C648 CASE NUMBER: 2013CV63 **▲COURT USE ONLY▲** Case Number: 2013CV63 Div. 3

COLORADO OIL & GAS ASSOCIATION'S
BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to C.R.C.P. 56(c), the Colorado Oil & Gas Association ("**COGA**") submits this Brief in Support of Its Motion for Summary Judgment ("**Motion**"), and respectfully requests the Court invalidate the City of Longmont's Charter Article XVI.

I. INTRODUCTION

The issue raised by this motion is whether the City of Longmont ("**City**" or "**Longmont**"), a home-rule municipality, may ban hydraulic fracturing and the associated storage and disposal of hydraulic fracturing wastes.

The Colorado Oil and Gas Conservation Commission ("**COGCC**" or "**Commission**") permits and regulates hydraulic fracturing to complete oil or gas wells and the associated storage and disposal of wastes created by the completion process. Nonetheless, a majority of the citizens of the City of Longmont voted to adopt Resolution 2012-67 to add Article XVI to the City Charter (the "**Charter Amendment**"), which purports to ban within City limits the hydraulic fracturing of any oil or gas well and the storage and disposal of waste products created in connection with the hydraulic fracturing process.

COGA is entitled to summary judgment invalidating the Charter Amendment as preempted by state law. It cannot be seriously disputed that the state has a significant interest in the regulation of oil and gas operations, and even has a *dominant* interest in certain aspects of oil and gas operations. As the Colorado Supreme Court has recognized, that dominant interest in the efficient production of oil and gas is sufficient to impliedly preempt bans on oil and gas production.

Even beyond the state's dominant interest, the ban cannot stand. In related litigation, the City itself, along with the Defendant-Intervenors in that case, has recognized the state's interest in the area and admitted that oil and gas regulation is not a matter of purely local concern. Because hydraulic fracturing activity is at least a matter of mixed state and local concern, the ban is preempted because it prohibits what the state allows and explicitly regulates.

For these reasons, COGA requests that this Court grant its summary judgment motion and invalidate the City's Charter Amendment.[1]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56; *Suss Pontiac-GMC, Inc. v. Boddicker*, 208 P.3d 269, 1270 (Colo. App. 2008). Summary judgment is not a disfavored procedural shortcut, but an integral part of the rules of procedure that is designed to secure the just and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Cont'l Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987) (applying *Celotex* in Colorado).

III. UNDISPUTED FACTS

A. THE NATURE OF AND NEED FOR HYDRAULIC FRACTURING.

1. Hydraulic fracturing is a well-completion technique. Fluid is pumped under high pressure into a cased wellbore that is perforated where it passes through an oil and gas bearing rock formation, creating small fissures in the target rock formation and allowing trapped hydrocarbons to be produced. *See* Ex. 1, Report of the Commission adopting new rules and amendments to address hydraulic fracturing (December 13, 2011) and its attached Exhibit A, Proposed Statement of Basis and Purpose,[2] at p. 9. The fluids used in hydraulic fracturing consist primarily of water, with sand or silica added as a proppant to keep the fissures from re-sealing and a small percentage of chemical additives. *Id.*; *see also* Ex. 2, "Information on

[1] COGA incorporates the legal arguments and citations in the COGCC's Motion for Summary Judgment, once filed, as if fully set forth herein.

[2] Under the State Administrative Procedure Act, the Statement of Basis and Purpose is incorporated into the Commission Rules as a matter of law. C.R.S. § 24-4-103(4)(c).

Hydraulic Fracturing" (COGCC 2013), which is required to be disclosed to surface owners pursuant to Rule 305.f.(3).D.

2. Hydraulic fracturing has been used to complete wells in Colorado for many decades, and tens of thousands of wells have been hydraulically fractured in Colorado. Ex. 1, Ex. A, p. 9; Ex. 2, p. 1; *see* Ex. 3, "Colorado Hydraulic Fracturing State Review; State Review of Oil and Natural Gas Environmental Regulations" (October 2011), at p. 8; *see also* Aff. of Murray Herring in Support of TOP Operating Co.'s Mot. for Summ. J. and Supporting Mem. Br. ("**Herring Aff.**") ¶ 5, attached as Ex. B. to TOP Operating Co.'s Mot. for Summ. J. and Supporting Mem. Br. (Mar. 21, 2014) ("every economic well in the Watten[berg] [Field] drilled in the last twenty years has been hydraulically fractured.").

3. The Commission has found that most hydrocarbon-bearing formations in Colorado would not produce economic quantities of oil or gas without hydraulic fracturing. Ex. 1, Ex. A. at 9 ("Most of the hydrocarbon bearing formations in Colorado would not produce economic quantities of hydrocarbons without hydraulic fracturing"); Ex. 2, at 1 ("Hydraulic fracturing . . . is now standard for virtually all oil and gas wells in our state. Hydraulic fracturing has made it possible to get this oil and gas out of rocks that were not previously considered as likely sources for fossil fuels.").

4. The City's own expert, in a related lawsuit before this Court, has opined that it is impossible to drill an economically viable oil or gas well in the Greater Wattenberg Area, which includes the City of Longmont, without hydraulic fracturing. Longmont's Consolidated Response to Plaintiffs' Motions for Partial Summary Judgment Ex. P, Affidavit of Dr. Anthony Ingraffea, at 2, § 4, *COGCC v. City of Longmont*, Case No. 2012cv702 (Boulder Cnty. Dist. Ct., Dec. 10, 2013); *see also* Herring Aff. ¶ 5 (TOP Operating, the primary operator within

Longmont, "cannot economically drill and complete these wells without the ability to conduct hydraulic fracturing operations . . . .").

5. As discussed more fully below, the Commission permits hydraulic fracturing performed in accordance with its Rules, as well as the underground disposal of water or other fluids into certain types of wells and the construction of certain earthen pits to contain produced water and drilling or completion fluids. 2 CCR 404-1.

B. THE CITY'S CITIZENS PASSED A CHARTER AMENDMENT BANNING HYDRAULIC FRACTURING AND THE STORAGE AND DISPOSAL OF FRACTURING WASTE, WHICH THE CITY'S COUNSEL ADVISED WAS BEYOND THE CITY'S AUTHORITY.

6. The City is a home-rule city the municipal boundaries of which include portions of both Boulder and Weld Counties, Colorado.

7. The City's attorneys have publicly advised the City Council that the City lacks authority to regulate hydraulic fracturing of oil and gas wells within the City's limits. Ex. 4, Official Minutes of the December 20, 2011 City Council Meeting, at 150–151. The City's attorneys also publicly advised the City Council that attempts by the City to ban the use of open pits would be preempted, because that is something the state still permits, and local governments cannot ban something that the state permits. Ex. 5, Reporter's Transcript, Regular Session of the Longmont City Council, April 17, 2012 at 16:8–22; *see also id.* at 13:14–21 & 16:4–7 (prior discussion by Mr. Schumacher, Sr. Planner for the City).

8. On November 6, 2012, a majority of the City's voters approved Ballot Question 300. *See* City's Answer ¶ 20. The passed Resolution amended the City's home-rule charter and became effective by operation of law when it was approved by a majority of the City's voting citizens.

9. The City's Charter Article XVI finds that hydraulic fracturing "is used to extract deposits of oil, gas and other hydrocarbons through the underground injection of large quantities

of water, gels, acids or gases; sands or other proppants; and chemical additives, ..." Ex. 6, §16.2 - Findings.

10. As amended, the City's Charter Article XVI now states:

> It shall hereby be the policy of the City of Longmont that it is prohibited to use hydraulic fracturing to extract oil, gas or other hydrocarbons within the City of Longmont. In addition, within the City of Longmont, it is prohibited to store in open pits or dispose of solid or liquid wastes created in connection with the hydraulic fracturing process, including but not limited to flowback or produced wastewater and brine.

Ex. 6, §16.3 - Policy. Accordingly, the City Charter bans any hydraulic fracturing in Longmont for any hydrocarbon wells, bans any open pits to store waste products associated with a hydraulically fractured well, and bans the disposal of any waste products associated with a hydraulically fractured well, including the drilling of any underground injection well that may be approved and permitted by the Commission.

C. THE EFFECT OF THE BANS REDUCES RECOVERABLE OIL AND GAS AND EXTENDS BEYOND CITY LIMITS.

11. Hydrocarbon-bearing formations do not conform to political boundaries on the surface. The City's ban on hydraulic fracturing impacts surrounding areas. For example, Synergy Resources Corporation ("**Synergy**"), a COGA member, obtained permits from the Commission to drill horizontal wells that would originate from a surface location within the neighboring City of Firestone, pass beneath acreage within the City, and terminate in an unincorporated area of Weld County. Ex. 7, Affidavit of Edward A. Holloway ¶¶ 2-3. Despite the Commission's approval, City officials have instructed Synergy that it may not hydraulically fracture that portion of the well that passes beneath the City's borders. *Id.* at ¶ 5.

12. Because of the City's ban on hydraulic fracturing, Synergy has decided not to drill its Commission-permitted wells that would have passed beneath the City's borders. *Id.* at ¶ 9.

IV. ARGUMENT: THE CITY MAY NOT PROHIBIT HYDRAULIC FRACTURING OR THE STORAGE AND DISPOSAL OF HYDRAULIC FRACTURING WASTE.

A. A HOME RULE CITY'S BAN OF ACTIVITIES THAT THE STATE ALLOWS IS PREEMPTED, EXCEPT IN MATTERS OF PURELY LOCAL CONCERN.

In evaluating whether legislation by a home-rule municipality, such as the City, is preempted by state law, the Court must first determine whether the subject matter of the legislation is of statewide concern, of mixed state and local concern, or of purely local concern. *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013); *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo. 2002).

If a matter is found to be of statewide concern, "the state legislature exercises plenary authority, and home-rule cities may regulate only if the constitution or statute authorizes such legislation." *Webb*, 295 P.3d at 486. Where matters involve mixed state and local concerns, a home-rule regulation may "exist with a state regulation only so long as there is no conflict; if there is a conflict, the state statute supersedes the conflicting local regulation." *Webb* at 486. The relevant test applicable in this case to determine whether home-rule legislation conflicts with state law "is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Id.* at 493 (*citing Commerce City*, 40 P.3d at 1284); *accord City of Northglenn v. Ibarra*, 62 P.3d 153, 165 (Colo. 2003); *Lakewood Pawnbrokers, Inc. v. City of Lakewood*, 519 P. 2d 834, 836 (Colo. 1973).

Finally, home-rule municipalities may "legislate in areas of local concern that the state General Assembly traditionally legislated in, thereby limiting the authority of the state legislature with respect to local and municipal affairs. . . ." *Webb,* 295 P.3d at 486 (emphasis added). If a local regulation conflicts with a state statute, it supersedes state law only in a matter of purely local concern. *Id*.

In characterizing a matter addressed by local home-rule legislation as purely local, purely state, or mixed local and state, Colorado courts evaluate four factors: (1) whether there is a need for state uniformity of regulation; (2) whether the municipal regulation has an extra-territorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits a particular matter to state or local regulation. *Webb*, 295 P.3d at 486; *Ibarra*, 62 P.3d at 156; *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1067 (Colo. 1992).

To defeat this motion, the City must demonstrate that its ban on hydraulic fracturing and the storage and disposal of waste is a matter of purely local concern. The City cannot make this showing. Indeed, the City and two of the Defendant-Intervenors, Earthworks and Sierra Club, in briefs filed with this Court in a related case, have judicially admitted that the regulation of oil and gas development is, at a minimum, a matter of mixed state and local concern. *See* Longmont's Consolidated Reply in Support of Longmont's Cross-Mot. for Partial Summ. J. at 8, *COGCC v. City of Longmont*, Case No. 2012cv702 (Boulder Cnty. Dist. Ct. Feb. 24, 2014) ("The Colorado Supreme Court has allowed local governments to regulate oil and gas development within their jurisdiction, because these are matters of mixed state and local concern."); Def./Int.'s Cross-Mot. for Summ. J. at 5, *COGCC v. City of Longmont*, Case No. 2012cv702 (Boulder Cnty. Dist. Ct. Jan. 21, 2014) ("However, the case law is clear that oil and gas operations are matters of mixed concern").

The City's ban is either impliedly preempted by the state's dominant interest in the efficient production and development of oil and gas, or is preempted under the *Webb* test as a matter of mixed state and local law by the COGCC's comprehensive regulation of activity related to hydraulic fracturing.

B. THE STATE HAS A SUBSTANTIAL INTEREST IN OIL AND GAS REGULATION.

1. Colorado case law has repeatedly confirmed the state's interest in oil and gas regulation.

Every Colorado case that has considered the nature of oil and gas regulation has held that the state has a substantial interest in this area. Indeed, no Colorado case has ever held that the regulation of oil and gas operations is a matter of purely local concern.

Voss is the key preemption case involving a ban of oil and gas operations. In *Voss*, the citizens of the City of Greeley, a home-rule municipality, voted to adopt an ordinance banning the drilling of any oil and gas well within the city limits. The Greeley City Council adopted a similar measure. Although recognizing the broad land use authority granted to home-rule jurisdictions by the Local Government Land Use Control Enabling Act, C.R.S. §§ 29-20-101 to 107, *see* 830 P.2d at 1064–65, the Court held that "[t]he state has an interest in oil and gas development and operations. That interest finds expression in the Oil and Gas Conservation Act ("**Conservation Act**"), §§ 34-60-101 to -126." *Id.* at 1065.

The Court analyzed Greeley's ban "against the state regulatory scheme to determine if the Greeley ordinances conflict with the state's interest in the efficient production and development of oil and gas resources in a manner preventative of waste and protective of the rights of common-source owners and producers to a fair and equitable share of production profits." *Id.* at 1066. To do so, the Court weighed the four factors to assess whether Greeley's ban would be preempted.

The Court found that "the first factor—the need for statewide uniformity of regulation of oil and gas development and production—weighs heavily in favor of state preemption of Greeley's total ban on drilling within city limits." *Id.* at 1067. The Court relied upon the fact that oil and gas reserves do not conform to any jurisdictional pattern and that Greeley's ban

could result in uneven and potentially wasteful production of oil and gas, which would conflict with the Commission's express authority to establish drilling units and to protect the correlative rights of owners and producers. *Id.* On that basis, the Court held:

> In our view, the state's interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city's total ban on drilling within the city limits.

Id.

With regard to the second factor, the Court held that "extraterritorial effect of the Greeley ordinances also weighs in favor of the state's interest in effective and fair development and production . . . ." *Id.* The Court relied upon the fact that limiting production to only one portion of a pool of oil and gas outside the city limits can result in increased production costs and that the drilling operation may be "economically unfeasible." *Id.* at 1067–68. Greeley's drilling ban, the Court found, affects the ability of those with mineral interests both within and outside the city boundary to obtain an equitable share of production profits in contravention of the Conservation Act. *Id.* at 1068.

Regarding the third factor, the Court found that "[t]he regulation of oil and gas development and production has traditionally been a matter of state rather than local control." *Id.* In evaluating the fourth factor, the Court held that the Colorado Constitution does not direct that oil and gas operations be regulated at the state or local level. *Id.*

As a result of its analysis, the Court concluded that Greeley's ban on oil and gas drilling was preempted by state law:

> [T]he state's interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is *sufficiently dominant* to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits.

Id. (emphasis added).

Even outside of the context of a ban on oil and gas development, Colorado courts have consistently recognized the state's interest in oil and gas regulation. Contemporaneously with *Voss*, the Court issued the companion opinion of *Board of County Commissioners v. Bowen/Edwards Associates, Inc.*, in which it reaffirmed the state's interest in efficient and fair development and production of oil and gas, the prevention of waste, and the protection of common-source owners and producers. 830 P.2d 1045, 1058 (Colo. 1992). While the Court did not find that the Conservation Act evidenced a legislative intent to preempt "all aspects of a county's statutory authority to regulate land use" involving oil and gas operations, it held that a local government could not regulate matters involving technical aspects of oil and gas or the location of wells:

> We hasten to add that there may be instances where the county's regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent such operational conflicts might exist, the county regulations must yield to the state interest.

Id. at 1060. Thus, in addition to affirming the significant state role in oil and gas regulation, *Bowen/Edwards* provides an additional independent basis on which the City's ban is preempted, because the Colorado Supreme Court explicitly recognized that the imposition of technical conditions on the drilling and pumping of wells—such as the City's ban of a particular well-completion technique here—necessarily conflicts with the state statutory and regulatory scheme.

Similarly, in *Town of Frederick*, the Court of Appeals relied on the "state's interest in oil and gas development and operations as expressed in the [Conservation Act]" to void several of

the Town's oil and gas regulations as a matter of law. 60 P.3d at 761. Relying on *Bowen/Edwards*, the court held that "the local imposition of technical conditions on well drilling where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law, gives rise to operational conflicts and requires that the local regulations yield to the state interest." *Id*. at 765.[3] Accordingly, when considering whether a local ban or regulation is preempted by state law, Colorado courts have always recognized the significant state interest in oil and gas regulation.

2. The substantial state interest in oil and gas regulation is reflected in the state's comprehensive regulatory scheme.

As the Colorado Supreme Court has determined: "There is no question that the [Conservation Act] evidences a significant interest on the part of the state in the efficient and fair development, production, and utilization of oil and gas resources. . . ." *Voss*, 830 P.2d at 1065–66 (*citing Bowen/Edwards*). In the preface to the Conservation Act, the Colorado legislature "declared [it] to be in the public interest to":

> (I) Foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health,

[3] The courts in *Bowen/Edwards* and *Town of Frederick* did not apply the pre-emption test utilized in *Webb* and *Ibarra*[while these cases were decided after *Bowen/Edwards* and *Town of Frederick* they set forth thetest used by the Colorado court's in earlier cases], *supra* at 7–9, because neither case involved a home-rule municipality. Statutory counties and towns, such as La Plata County and the Town of Frederick, are administrative divisions of the state and must be delegated any regulatory authority they exercise. *See, e.g., City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1253 (Colo. 2000). Moreover, neither case involved a ban on activity permitted by the state. In *Bowen/Edwards*, the county had imposed permitting requirements for certain oil- and gas-related activities. *Bowen/Edwards*, 830 P.2d at 1051. Similarly, the Town of Frederick had also adopted permitting requirements regulating aspects of oil and gas operations. *Town of Frederick*, 60 P.3d at 760. Because the regulations at issue did not ban activities outright, and because these cases concerned statutory local governments, the *Webb* test did not apply in either case.

> safety, and welfare, including protection of the environment and wildlife resources;
>
> (II) Protect the public and private interests against waste in the production and utilization of oil and gas;
>
> (III) Safeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that each such owner and producer in a common pool or source of supply of oil and gas may obtain a just and equitable share of production there from; and
>
> (IV) Plan and manage oil and gas operations in a manner that balances development with wildlife conservation in recognition of the state's obligation to protect wildlife resources and the hunting, fishing, and recreation traditions they support, which are an important part of Colorado's economy and culture.

C.R.S. § 34-60-102(1)(a).

The General Assembly has also declared that it is the "intent and purpose of the [Conservation Act] to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, welfare, the environment and wildlife resources," and "subject further to the enforcement and protection of the co-equal and correlative rights of the owners and producers of a common source of oil and gas, so that each common owner and producer may obtain a just and equitable share of production therefrom." C.R.S. § 34-60-102(1)(b).

The *Voss* Court relied on many of these expressions of state policy and public interest, as well as on the Conservation Act's definition of waste, to highlight the state's interest in ensuring the production of oil and gas at maximum efficient rates of production. *Voss*, 830 P.2d at 1067. Indeed, C.R.S. § 34-60-107 provides that "[t]he waste of oil and gas in the state of Colorado is prohibited by this article." Waste is specifically defined to include "the production of gas in quantities or in such manner as . . . unreasonably diminishes the quantity of oil or gas that ultimately may be produced . . . ." C.R.S. § 34-60-103(11); *accord* C.R.S. § 34-60-103(13).

As the *Voss* Court noted, the Conservation Act established the Commission and vested it with broad authority to enforce the Act's provisions, make and enforce rules and orders, and do whatever may be reasonably necessary to carry out the provisions of the Conservation Act. *Voss*, 830 P.2d at 1065; C.R.S. § 34-60-105(1). The Commission also is vested with authority to regulate oil and gas operations "so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility." C.R.S. § 34-6-106(2)(d); *see also* C.R.S. § 34-60-106(1)(c) (Commission regulates well construction to prevent the escape of oil and gas, the pollution of water supplies and blowouts and other dangerous conditions). In addition, the legislature gave the Commission the authority to regulate the spacing of wells, C.R.S. § 34-60-106(2)(c), including to establish or amend drilling and spacing units. C.R.S. § 34-60-106(11)(a)(I)(A).

The Conservation Act also specifically vests the Commission with authority to issue permits for oil and gas wells, § 34-60-106(1)(f), and to regulate the drilling, shooting, and chemical treatment of hydrocarbon wells, § 34-60-106(2)(a) & (b). "Shooting" is the process of fracturing the rock in the target formation, which once was accomplished by detonating high explosives in the wellbore, but which now is typically accomplished by hydraulic fracturing. *See The Dictionary for the Oil and Gas Industry*, 244 (Univ. of Texas Ext., 1st Ed. 2005), attached as Ex. 8. "Chemical treatment" refers to any process that involves the use of a chemical to affect an operation. *Id.* at 44.

Under the authority of the Conservation Act, the Commission has adopted a comprehensive set of oil and gas regulations covering drilling, developing, producing and abandoning wells (300

Series), safety, including groundwater sampling (600 Series), aesthetics and noise control (800 Series), waste management (900 Series), and protection of wildlife (1200 Series), among other areas. 2 CCR 404-1; *see http://cogcc.state.co.us/RR_Docs_new/Rules_new2.html*. These regulations, which are discussed in detail below, unequivocally reflect the state's substantial interest in the regulation of all aspects of oil and gas operations.

C. THE CITY'S BANS OF HYDRAULIC FRACTURING AND RELATED STORAGE AND DISPOSAL ACTIVITIES ARE IMPLIEDLY PREEMPTED BY THE STATE'S "SUFFICIENTLY DOMINANT" INTERESTS.

In *Voss,* the Colorado Supreme Court held that the state's interest in the efficient and equitable development and production of oil and gas, as manifested in the Conservation Act, is "sufficiently dominant" to override Greely's ban on oil and gas operations. *Voss,* 830 P.2d at 1068. The Court did not make clear whether the home-rule city's ban was impliedly preempted due the state's dominant interest, or whether the ban was preempted due to its irreconcilable conflict with state law in a matter of mixed state and local interest.

The answer to the precise basis for the *Voss* decision came 17 years later in *Colorado Mining Ass'n v. Board of County Commissioners,* 199 P.3d 718 (Colo. 2009). In that case Summit County banned a particular mining technique—the use of cyanide or other chemicals in heap or vat leach mining operations—similar to the City's ban here of a particular oil and gas completion technique. The Court first noted that "local land use ordinances banning an activity that a statute authorizes an agency to permit are subject to heightened scrutiny in preemption analysis . . . ," *id*. at 725, and that "[c]ourts examine with particular scrutiny those zoning ordinances that ban certain land uses or activities . . . ." *Id.* at 730.

The Court next reasoned that the Mined Land Reclamation Act ("**MLRA**") and its implementing regulations set forth a "sufficiently dominant state interest in the controlled use of chemicals to process valuable minerals." *Id.* at 732. In finding that dominant state interest, the

Court afforded "significant weight" to a statement in the MLRA that extraction of minerals is "necessary and proper," and that the legislature "encouraged the development of an economically sound and stable mining and minerals industry" and "encouraged the orderly development of the state's natural resources." As discussed above, these MLRA's legislative declarations have counterparts in the Conservation Act, many of which the *Voss* Court similarly relied upon.

Echoing *Voss*, the Court concluded that "a patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources." *Id.* at 731. As such, the Court held that "[d]ue to the sufficiently dominant state interest in the use of chemicals for mineral processing, …the MLRA impliedly preempts Summit County's ban…" *Id.* at 721.

The Court extensively discussed and relied on its decision in *Voss* to void the County's ban as impliedly preempted: "We find *Voss* particularly instructive because, if a home-rule city may not enact a ban prohibiting what the state agency may authorize under the statute, surely a statutory county may not do so." *Id.* The Court confirmed that its holding in *Voss* was based on implied preemption: "We held that the state interest manifested in the state act was 'sufficiently dominant' to override the local ordinance. [Citation omitted.] Sufficient dominancy is one of the several grounds for implied state preemption of a local ordinance." *Id.* at 724. But in contrasting *Bowen/Edwards*, the Court made clear that the state interest did not impliedly preempt all aspects of local land-use regulations applicable to oil and gas operations. *Id*. The home-rule city's ban in *Voss* was impliedly preempted because it addressed matters involving the efficient and equitable production of hydrocarbons:

> We found [in *Voss*] the ban to be unenforceable because "the state's interest in efficient development and production of oil and gas in a manner preventative of waste and protective of the correlative rights of common-source owners and producers to a fair share of production profits preempts a home-rule city from totally excluding all drilling operations within the city limits. *Id.* at 1069."

Id.[4]

The City's hydraulic fracturing bans, no less than Greeley's oil and gas ban, intrude into these areas of oil and gas operations in which the State has a sufficiently dominant interest. Indeed, all of the key considerations the *Voss* Court relied upon in finding preemption remain true today: oil and gas reserves still do not conform to any jurisdictional pattern, and the City's bans could result in uneven and potentially wasteful production of oil and gas. *See* Undisputed Facts, *supra* § III, ¶¶ 11 & 12. Moreover, the City's bans affect the ability of those with mineral interests both within and outside the city boundary to obtain an equitable share of production profits. *Id.* ¶ 12. Limiting production to only one portion of a pool of oil and gas outside the city limits can still result in increased production costs and the drilling operation may be "economically unfeasible." *Id.* ¶¶ 3, 4 & 12. Indeed, as found by the COGCC and the City's own expert, hydraulic fracturing is necessary to develop an economically viable oil or gas well. *See* Ex. 1 at Ex. A, p. 9; Ex. 2 at 1; Undisputed Facts, *supra* § III, ¶¶ 3 & 4.

Furthermore, the City's ban, just like the Greely counterpart considered in *Voss*, conflicts with the Commission's express authority to prevent waste, establish drilling units, and to protect

[4] In another notable case involving a municipal ban, the Supreme Court held that state law preempted a home-rule city ordinance banning unrelated sex offenders from living together. *Ibarra*, 62 P.3d 151. There the Court held that the City's ban would create a "'patchwork approach' to the placement of certain foster care children," the effect of which would "ripple" outside of the municipality. *Id.* at 161. The Court concluded that the state's interest in fulfilling its statutory mandates to protect delinquent children in need of state supervision and treatment "is *sufficiently dominant* to override a home-rule city's interest in regulating the number of registered juvenile sex offenders who may live in one foster care family." *Id.* at 163 (emphasis added).

the correlative rights of owners and producers. The City's ban will discourage oil and gas operations within the City, making those resources unavailable, in direct contravention of stated policy evidenced in the Conservation Act. Ex. 7, ¶ 9. Equally obvious is that the City's ban will have extraterritorial effect by forcing operators to complete wells outside the City but prohibiting well completions from extending into the City limits. *See* Undisputed Facts, *supra* § III, ¶¶ 11 & 12. This diminishes the availability of resources from neighboring jurisdictions as well. Ex. 7, ¶¶ 7 & 8. Thus, the City's ban will create the same "patchwork" of local prohibitions that the Court proscribed in *Voss*, *Colorado Mining Ass'n*, and *Ibarra*. Accordingly, the City's ban is impliedly preempted by the state's sufficiently dominant interest in efficient and equitable development and production of oil and gas resources.

D. THE CITY'S BAN PROHIBITS CONDUCT THAT THE STATE ALLOWS AND IS THEREFORE PREEMPTED.

Just last year, the Supreme Court in *Webb* struck down Black Hawk's ban on bicycles travelling from outside its boundaries, on the grounds that, in this area of mixed local and state concern, the ban failed to comply with the state statute requiring that local governments provide alternative bicycle paths as a condition of banning bicycles on city streets: "Black Hawk does not have authority, in a matter of mixed state and local concern, to negate a specific provision the General Assembly has enacted in the interest of uniformity." *Webb*, 295 P.3d at 492–93.

This holding is consistent with *Colorado Mining Ass'n*, in which the Court relied upon the following "common themes" in *Voss* and *Bowen/Edwards*: "(1) the state has a significant interest in both mineral development and in human health and environmental protection, and (2) the exercise of local land use authority complements the exercise of state authority but cannot negate a more specifically drawn statutory provision the general assembly has enacted." 199 P.3d at 730. It is also consistent with the City Attorney's public advice to the City Council that

attempts by the City to ban the use of open pits would be preempted, because that is something the state still permits, and local governments cannot ban something that the state permits. Ex. 5, Reporter's Transcript, Regular Session of the Longmont City Council, April 17, 2012 at 16:8–22.

Accordingly, Article XVI of the Longmont Charter conflicts with state law because it "negates" hydraulic fracturing activities that the Commission extensively authorizes and regulates. The Commission took hydraulic fracturing into consideration when it comprehensively updated its regulations in 2008, analyzed groundwater quality trends in 2009, adopted a special notification policy in 2010, and designed a new groundwater sampling and monitoring program during 2011. Ex. 3 at 19. It amended its Rules in December 2011 for the specific purpose of addressing hydraulic fracturing concerns. Ex. 1 at 9. As amended, the Commission Rules use the term "hydraulic fracturing" at least 41 times.

The Commission's technical review of a proposed hydrocarbon well typically begins when an operator files an application for a permit to drill a well ("**APD**" or "**Form 2**") and an Oil and Gas Location Assessment ("**OGLA**" or "**Form 2A**"). Rule 303. The Commission's Rules provide specific rights to local governments to review the APD and the OGLA, extend deadlines for review, request consultation, present arguments and evidence to the full nine (9) member Commission as to why any proposed well should not be permitted, and to appeal any of the Commission's decisions or determinations pursuant to the State Administrative Procedure Act. Rules 305.d, 305.e, 306.b, 509, 510, 528. Among other things, the Commission requires the producer to provide extensive information regarding both the surface and bottom-hole locations of the proposed well and the topography, soils, vegetation, wildlife, water sources, land uses, dwellings, and other structures in the proposed well's proximity. *Id.* The Commission

imposes specific requirements on the technical design of the well. Rule 317. To evaluate the information regarding the proposed well and its potential impact upon the proposed location, the Commission's employs a technical staff that receives specific training on hydraulic fracturing technology and developments. Ex. 3 at 29–30.

The Commission also requires producers to test their well casings in advance to verify that they can withstand the pressures that will be applied during hydraulic fracturing. Rule 317.j. It mandates that the operator design its well such that hydraulic fracturing fluids are confined to the objective formations, and to monitor and record pressures continuously during hydraulic fracturing operations to assure that hydraulic fracturing fluids are confined to the target formation and that wellbore integrity is maintained. Rules 317 & 341. Within thirty days after completing or re-stimulating a formation, operators must file a Completed Interval Report (Form 5A) that summarizes the fracturing treatment. Rule 308B.

The Commission also regulates the chemicals used in hydraulic fracturing. It requires producers to maintain Material Safety Data Sheets and an inventory of all chemical products used down hole, including hydraulic fracturing fluids. Rule 205. Upon the conclusion of a hydraulic fracturing treatment, producers must report the total volume of water or other base fluid that was used in the hydraulic fracturing treatment, information regarding each chemical or additive used in the hydraulic fracturing fluid, the maximum concentration of each chemical added to the fracturing fluid, and the chemical abstract service number for each such chemical. Even if the supplier of the fluid claims that its specific formula is a trade secret, specific information about the chemicals nevertheless must be provided to the Commission or to any health care professional who requires such information. Rules 205A.b.(5) and d.(2).

Producers must notify landowners and local governments in advance of their intention to hydraulically fracture a well. Additionally, they must provide landowners with a copy of the Commission's informational brochure on hydraulic fracturing (*see* Ex. 2), instruct them on how to access additional information regarding the proposed well on the Commission's website, and inform them of their right to oppose or comment upon the proposed operations. Rule 305.c.

The Commission also extensively regulates the handling, transportation, and disposal of waste products associated with the drilling and operation of oil and gas wells. *See* Rules 316A, 323, 324A, 325, 326, and 901–08. The Commission may authorize the disposal of produced water by evaporation in a properly constructed and permitted pit or by injection into a properly designed and permitted disposal well. Rules 907.c(2) & 325. An operator must apply to the Commission for a permit to construct a pit. Rule 903. The Commission specifically regulates the locations of pits, their design, and the materials used to construct them. Rules 902–04. The Commission also regulates the closure of pits, the disposal of materials from pits, and the reclamation of land where a closed pit was located. Rules 905, 1001–04.

Finally, drilling fluids may never be disposed in a pit, but must be injected into a disposal well that has been approved and permitted by the Director, delivered to a commercial solid waste disposal facility, or treated for use in land applications at a centralized exploration and production waste management facility. Rule 907.d. The Commission has been delegated the authority to permit underground injection wells under the Environmental Protection Act. *See* Ex. 9, Underground Injection Control Program, Memorandum of Agreement for Program Delegation (Aug. 15, 1989)[5]; 2 CCR 404-1, Rule 325; 42 U.S.C. § 300g-2. Before the Commission permits injection of fluids, the operator must demonstrate that the injection

[5] Located on the COGCC website at http://cogcc.state.co.us/Library/MOU-MOA/CO142_%20Revised_MOA_Aug1_-89.pdf.

operations will not pollute any underground source of potable water. Rule 324A.d. The operator cannot commence operations for the underground disposal of fluids without written authorization from the Director of the Commission. Rule 325. To obtain such authorization, the operator must file an Underground Injection Formation Permit Application and an Injection Well Permit Application. Rule 325. Operators must file a monthly report of fluids injected. Rule 316A. Produced and injected water must be measured. Rule 330. The operator also must provide detailed technical information and perform a mechanical integrity test. Rule 325, 326. The Commission must publish a notice of the permit application and consider comments submitted by interested stakeholders, like the City, before deciding whether to permit the proposed injection well. Rule 325.l.–n.

All of these regulations are negated if the City's ban is upheld. The City's ban is preempted under the conflict test applied in *Webb,* and other Colorado cases, because it impermissibly prohibits what state law allows.

V. CONCLUSION

For the foregoing reasons, COGA respectfully requests that the Court grant summary judgment in favor of COGA declaring that the City's ban on the use of hydraulic fracturing techniques to complete hydrocarbon wells and its ban on the use of open pits to store hydraulic fracturing waste and on the disposal of such waste, all as contained in Article XVI of the Longmont Municipal Home-Rule Charter, are preempted and, thus, invalid and unenforceable.

Dated this 28th day of March, 2014.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
COLORADO OIL & GAS ASSOCIATION

Original signature on file in the offices of Beatty & Wozniak, P.C.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of March, 2014, a true and correct copy of the foregoing **COLORADO OIL & GAS ASSOCIATION'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** was served via ICCES, on:

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